

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Appellant,

v.

MICHAEL ANTHONY HUGHES,

Defendant and Respondent.

G041437

(Super. Ct. No. SWF020924)

O P I N I O N

Appeal from an order of the Superior Court of Riverside County, Judith C. Clark, Judge. Affirmed.

Rod Pacheco, District Attorney, and Matt Reilly, Deputy District Attorney, for Plaintiff and Appellant.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Respondent.

The District Attorney of Riverside County appeals a superior court order granting defendant's motion to dismiss a gang allegation pursuant to Penal Code section 995.<sup>1</sup> Because the magistrate made factual findings fatal to the prosecution of that allegation, we uphold the superior court's order.

#### FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a shooting that occurred in Temecula on April 11, 2007. At that time, defendant was not in a gang, but he was having problems with gang member Damont Jackson, who belonged to the Temecula Bloods. Defendant and Jackson had been harassing each other and fighting back and forth, and on April 11, defendant drove to Jackson's high school to confront him. Defendant was accompanied by his brother Maurice, Aaron McDowell and Anthony Lee, none of whom had any gang ties.

When defendant's group got to the school, Jackson was not there. Jackson's friends said they could call him and have him come to the school, but defendant's group did not stick around. Instead, they got back into defendant's car and drove away, later picking up Davi Young and Mica Caruso, who were members of the Neighborhood Crips. Young counseled getting a gun in case they ran into Bloods, and defendant said they could get a gun at his house. But when they went there, he could not find it.

Defendant got back in the car with the others (except his brother, who stayed home) and drove to Young's house. There, Young obtained a blue bandana, a ski mask and a semiautomatic handgun. As defendant began driving again, Young showed everyone the gun and said, "We need to get this thing going." Defendant drove to Jackson's house and parked on a nearby street. Then Young handed him the

---

<sup>1</sup>

All further statutory references are to the Penal Code.

gun, and he fired several rounds toward Jackson's house. After that, he got back in the car and drove away with the others.

Gang expert Mike Gallivan testified the Neighborhood Crips are a San Diego gang which is antagonistic to the Bloods. And even though defendant was not a Crip — nor indeed, a member of any other gang — Gallivan believed he acted for the benefit of, at the direction of, or in association with the Neighborhood Crips in carrying out the shooting. In forming this opinion, Gallivan relied on the fact defendant had been having problems with Blood member Jackson, he enlisted Neighborhood Crip members Young and Caruso to help him get back at Jackson, Young was sporting Crip colors (blue) at the time of the shooting, and the shooting would enhance the Crips' reputation for violence.

Defendant and his companions were charged with shooting at an inhabited dwelling and assault with a deadly weapon. It was also alleged for enhancement purposes that defendant personally used a firearm and that he acted “with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]” (§ 186.22, subd. (b).) In challenging the enhancement at the preliminary hearing, defendant's attorney argued defendant's intent was not to aid or promote the Crips, but simply to get Jackson to stop harassing him. Counsel claimed, “That's his intent. It's a personal one. For his own safety. Maybe it's even for his own personal revenge. It just happens that he has two friends, or two people with him” who are gang members.

Characterizing counsel's argument, the court said, “So you're saying your client doesn't care whether or not [the shooting] benefits the gang; that's not his intent. His intent is to settle the score with Jackson?” Counsel answered, “Right. [¶] . . . [¶] My client's specific intent is not to help gang members commit a crime, or to commit a crime for a gang, he's doing his own thing.” “[H]is specific intent was to

settle a personal beef with Mr. Jackson. And I think that issue is fatal . . . to the People's trying to" prove the gang allegation.

After hearing considerable argument on the issue, the magistrate ruled, "[I]t's a close call, but it does appear to me that this is a personal fight between [defendant] and Mr. Jackson. [¶] I agree with everything [the prosecutor] said, [defendant] gets the gun, he shoots the gun, he shoots in the direction of the house, but I think it's too speculative to say that a non-gang member — and I'm not saying that a non-gang member can't promote, assist [or] support a gang, . . . but in this particular case we have a non-gang member in a dispute with another individual who happens to be a gang member, and then two gang members [Young and Caruso] are clearly facilitating and promoting this.

"And I can understand their motives in doing so, because Mr. Jackson is a rival gang member. [But] I think [defendant] is a young man that is just angry and stupid and took the gun, wanted to go after Mr. Jackson by shooting at his house, sending him a message, 'Back off.' But to say that he's doing that because he wants to assist, promote, or further a gang where there's no evidence the gang exists in Temecula, that that would somehow further the gang, that he's not a member of, in a different county, in a city that's 100 miles away, is just too much of a stretch." Therefore, the magistrate dismissed the gang allegation as to defendant.

Notwithstanding this ruling, the district attorney realleged the gang allegation when it filed the information in superior court. Defendant moved to dismiss the allegation pursuant to section 995, and the superior court found the motion well taken. It determined the magistrate made factual findings that precluded the district attorney from prosecuting defendant for the gang enhancement. It therefore granted defendant's motion to dismiss the enhancement.

## DISCUSSION

In challenging the superior court's ruling, the district attorney contends the magistrate's assessment of defendant's intent was a legal, not a factual, finding. The distinction is important because, following a preliminary hearing, the prosecution may charge the defendant with any offense shown by the evidence at the hearing, *unless the magistrate makes factual findings that preclude the charge.* (§ 739; *Jones v. Superior Court* (1971) 4 Cal.3d 660, 664-666; *People v. Manning* (1982) 133 Cal.App.3d 159, 165.)

In order to prove the gang enhancement under section 186.22, the prosecution must not only show the defendant committed a felony for the benefit of a criminal street gang, but also that he acted "with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]" (§ 186.22, subd. (b).) The specific intent requirement is a critical component of the statute, and unless it is established by the evidence, the enhancement cannot be imposed against a defendant. (*Briceno v. Scribner* (9th Cir. Feb. 23, 2009) \_\_ F.3d \_\_; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199.)

At defendant's preliminary hearing, the magistrate described the friction between defendant and Jackson as a "personal fight" that took on gang overtones only because Jackson and two of defendant's companions, Young and Caruso, happened to belong to rival gangs. The court contrasted defendant's personal motive with Young and Caruso's broader motive, which was to promote the supremacy of their gang over Jackson's gang. The court stated, "I can understand their motives in [going after Jackson] because [he] is a rival gang member." But "I think [defendant] is a young man that is just angry and stupid and took the gun, wanted to go after Mr. Jackson by shooting at the house, sending him a message, 'Back off.'" The trial court's findings that the shooting grew out of a *personal* dispute between defendant and Jackson and that defendant expected to achieve a *personal* benefit from the shooting strike us as

factual findings that are fundamentally inconsistent with the specific intent requirement of the gang enhancement statute.

The district attorney reads the magistrate's ruling differently, analogizing it to the magistrate's decision in *People v. Superior Court (Gibson)* (1980) 101 Cal.App.3d 551. But in *Gibson*, the magistrate simply reviewed the preliminary hearing evidence and concluded it was insufficient to support certain charges and allegations. (*Id.* at p. 553.) The magistrate did not make any specific factual findings about the evidence. Because the magistrate's comments amounted to nothing more than "a mixture of suggestions about his factual findings and statements about his conclusions concerning reasonable cause," the *Gibson* court determined they did not constitute factual determinations for purposes of the defendant's section 995 motion in superior court. (*Id.* at p. 554.)

Here, in contrast, the magistrate specifically found that defendant's beef with Jackson was personal in nature and that he shot at Jackson's house not to promote his companions' gang, but to get Jackson to leave him alone. He did not say the prosecution had failed to convince him or that the evidence was in equipoise. He said it had convinced him this was not a gang crime but a personal one. This is not a conclusion, it is a finding. And although it led to the secondary conclusion that the gang enhancement did not apply to defendant — the legal conclusion he expressed in his ruling that "there being no sufficient cause to believe that [defendant] is guilty of that [enhancement allegation] I order [the defendant] discharged on that allegation[.]" — it convinces us the superior court's ruling in this case was correct. It rightly construed the magistrate's findings regarding defendant's intent as factual findings that preclude application of the gang enhancement in this case.

DISPOSITION

The superior court's order dismissing the gang enhancement allegation against defendant is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.